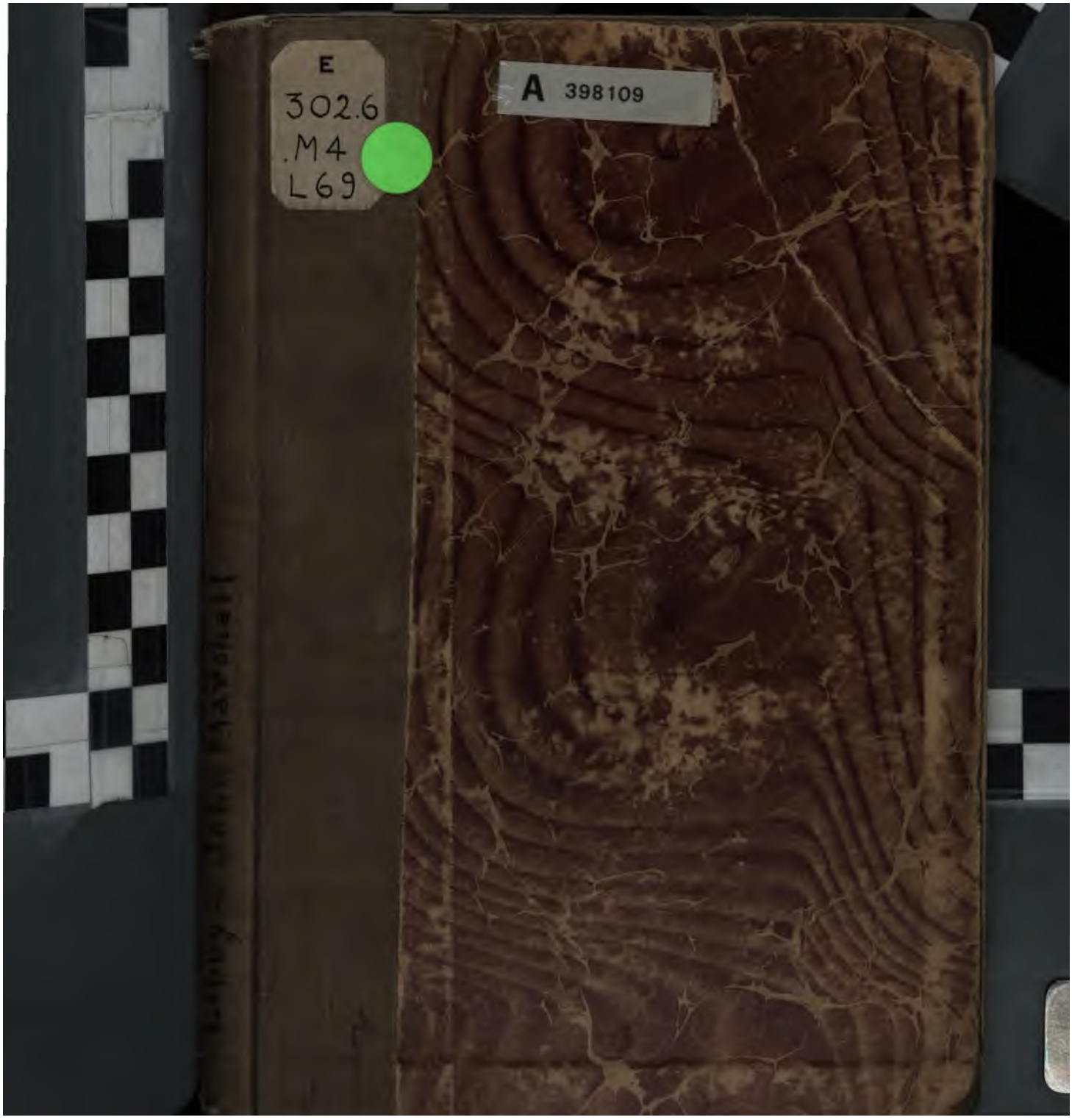

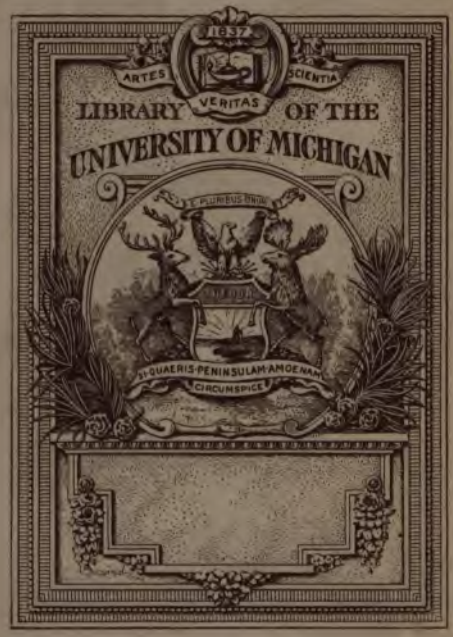
1837
ARTES
SCIENTIA
VERITAS
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
SI QUAERIS PENINSULAM AMOENAM
CIRCUMSPICE

Bowdoin College

JOHN MARSHALL

AN ADDRESS

DELIVERED AT THE COLLEGE ON FEBRUARY 4, 1901,
THE CENTENARY OF THE INSTALLATION OF
JOHN MARSHALL AS CHIEF JUSTICE
OF THE UNITED STATES

BY

HON. CHARLES FREEMAN LIBBY, A.M.

BRUNSWICK, MAINE
PUBLISHED BY THE COLLEGE
1901

JOHN MARSHALL.

TO-DAY marks the first centennial of the installation of John Marshall as Chief Justice of the United States. Among the distinguished men who have held that high office, he has been deemed by the American Bar Association as worthy of special honor. At the annual meeting of the Association held in Buffalo in 1898 a committee was appointed, consisting of one member from each State and Territory and from the District of Columbia, to bring the matter of a proper observance of "John Marshall Day" to the attention of the bench and bar of the United States. The Committee has recommended that not only the Bar Associations of the several States should appropriately observe the day, but that commemorative exercises should be held in all schools of law and institutions of learning throughout the country, "to the end that the youth of our country may be made more fully acquainted with Marshall's noble life and distinguished services"; for the lessons that are to be learned from a study of the life and services of the "Great Chief Justice" are valuable not only to the legal profession, but to all who are students of our constitutional history, and who can draw inspiration from a life of rare usefulness and virtue.

In the time allowed to me I cannot hope to give anything like a full sketch of the varied services which John Marshall rendered to the republic, but only to present an imperfect sketch of his character and of the salient features of his career, which filled more than the allotted span of life and was crowded with splendid achievement. If what I may say shall lead the young men of this generation to a higher ap-

preciation of the simplicity, beauty, and nobility of the character of John Marshall, I shall have accomplished the object I had in view in accepting the invitation to address you. A cursory study of his life brings out prominently the fact that we are dealing with a man of large natural endowment, whose strength was derived from a vigorous ancestry, unaided by the discipline of the schools. He is a striking example of how great a factor heredity is in the life of the individual and how subtle and far-reaching is its influence. We are the product, as has been well said, not only of the yesterdays of our own lives, but of the many yesterdays of our ancestors.

Happy is the individual who not only is born with a sound mind in a sound body, but who lives in an environment which stimulates him to his highest efforts. While Marshall was fortunate in his ancestors, he was equally fortunate in his environment. He lived in times which quickened into early growth the strong qualities of his nature and furnished ample opportunity for their highest exercise. A lesser man than he might not have seen or seized these opportunities, but therein lay the quality of the man. At his birth the mutterings of the storm which burst nineteen years later were already heard. The fatuous policy of the mother country of denying to her colonists the rights of Englishmen, and of encroaching upon their liberties by oppressive legislation, had already begun to arouse a spirit of rebellion, which needed only the flash of the first gun at Lexington to burst into open revolt. These colonists had been educated in a stern school, in which religious and political freedom were not empty phrases, but energizing truths. The progress from loyalty to rebellion was slow, but sure, and accompanied by a progressive education in the science of government, which found its ultimate expression in the Declaration of Independence and the Constitution of the United States. This education involved much discussion of political principles in public and in private; but the magnitude of the issues lifted the subject

out of the commonplaces of controversy, and invested it with an importance peculiarly its own, for the issues were real and vital. In those days, political philosophy found its object-lesson in the blindness and obstinacy of the mother country. "No taxation without representation" became a political slogan, and patriotism took concrete form in resistance to tyranny. No one could live in such an atmosphere without imbibing an ardent love of liberty and a high conception of civic responsibilities.

In such times as these John Marshall was born, Sept. 24, 1755, in the little village of Germantown, in the frontier county of Fauquier, in Virginia. He came of good English and Welsh stock. His father was Colonel Thomas Marshall, a land surveyor, who accompanied his schoolmate, George Washington, in his surveying expeditions for Lord Fairfax. He was a man of marked ability and vigorous intellect, and overcame the defects of early education by a diligent cultivation of his natural powers. At a time when books were scarce in Virginia he had collected a small library of the best English authors, and devoted much of his time to the training and education of his children. How well he succeeded is shown in the career of his eldest son, whose obligations to his father were never forgotten. On this point, Judge Story, in his eulogy of Marshall, says: "My father (would he say with kindled feelings and emphasis),—my father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life."

While John Marshall makes no special mention of his mother, I am inclined to think that he owes as much to her as to his father. There is a strain of feminine delicacy and tenderness in his composition which points to a maternal source, and his chivalrous regard for women throughout his life must have found its prompting in some prototype in his own home. What little we know of his mother supports the theory that strong men trace their virtues to the female side. Her maiden name was Mary Isham Keith. She came of

good family; for we are told that her father, James Keith, an Episcopal minister, was "cousin-german to the late Earl Marischal and to Field Marshal James Keith, one of the most valued of the great Frederick's lieutenants, who saved the Prussian army and fell at Hochkirch, 'as poor as a Scot,' though he had the ransoming of three cities." She was the mother of fifteen children, seven sons and eight daughters, all of whom she reared to mature years. The historian wisely adds, "She could have little opportunity to make any other record for herself, and could hardly have made a better one." Of the fifteen, John Marshall was the first-born, a child of rare gentleness and intelligence.

His early education was obtained at home,— at first under his father's tuition and then with a tutor, a Scotch clergyman who lived in the family. At fourteen he attended school one term at a classical academy in Westmoreland County, where his father and General Washington had been pupils. Returning home, he read Horace and Livy with his old preceptor; and this completed his early scholastic training. But he had acquired a love for good literature, and especially poetry,— which has been a food to many noble minds; and at the early age of twelve, it is said, he knew by heart a large portion of Pope's writings, and had made himself familiar with Dryden, Shakespeare, and Milton.

He was fond of athletic sports and life in the open air; and to these tastes he owed the sturdy constitution which served him so well during the exposures of military campaigns and the arduous duties of his later life.

At eighteen he commenced the study of law. But the times were not favorable for scholastic pursuits, and he became so absorbed in the questions that were agitating the public mind that his studies were interrupted. Before he was twenty years old, he had enrolled himself as a volunteer in a militia company, and with the earnestness which was characteristic of his nature devoted himself to mastering the details of military drill and tactics, preparatory for service in the field.

His appearance at this time is described by a kinsman who was an eye-witness to Marshall's first appearance in the rôle of military leader in his own county: "His figure I have now before me. He was about six feet high, straight, and rather slender; of dark complexion, showing little, if any, rosy red, yet good health; the outline of the face nearly a circle, and within that eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature. An upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength. The features of the face were in harmony with this outline, and the temples fully developed. The result of this combination was interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient. He wore a purple or plain blue hunting-shirt and trousers of the same material, fringed with white; and a round black hat, mounted with the buck's tail for a cockade, crowned the figure and the man. He went through the manual exercise by word and motion, deliberately pronounced and performed in the presence of the company, before he required the men to imitate him, and then proceeded to exercise them with the most perfect temper. Never did a man possess a temper more happy or, if otherwise, more subdued and better disciplined."

As soon as the news of the battle of Lexington was received in Virginia, he offered his services to the State, and was appointed first lieutenant in the first regiment of minute-men raised in Virginia, of which his father was major. This was the commencement of his military service during the Revolutionary War, which continued, with slight interruptions, from 1775 to 1781. He participated in the battles of Iron Hill, Brandywine, Germantown, and Monmouth, and endured the hardships and privations of the ghastly winter at Valley Forge. How well he bore himself during that period of trial we know from the testimony of a brother officer, who has said: "He was the best-tempered

man I ever knew. During his sufferings at Valley Forge nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well: if only meat, it made no difference. If any of the officers murmured at their deprivations, he would shame them by good-natured raillery or encourage them by his own exuberance of spirits. He was an excellent companion, and idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote."

In addition to his field services he acted at this time as Deputy Judge Advocate of the army, and performed the delicate duties of that office to the satisfaction of all concerned. He was thus brought into personal relations with Washington and with Hamilton, "two men, whom of all others on earth, he most loved, and whose impress he bore through life."

Towards the close of 1779, the term of enlistment of his regiment having expired, he returned to Virginia; and, while awaiting further orders, he attended a course of law lectures by Chancellor Wythe at William and Mary's College, and in the following summer obtained a license to practise law.

On the invasion of his State by the British troops in 1780, he again took the field, and remained in service during the subsequent campaign against Arnold which resulted in the latter's defeat. In January, 1781, feeling that his services were no longer needed, he resigned his commission, and commenced the practice of his profession in his native county.

Unlike most young lawyers, he had not long to wait for clients, and almost from the start entered upon a remunerative practice. His rapid advancement at the bar was favored by the conditions which existed at the close of the Revolutionary War. The unsettled state of the country was favorable to litigation, and the dockets of the courts were cumbered with law-suits. His success was largely due to his sound judgment and power of vigorous and logical

statement rather than to technical learning or rhetorical display, for it could hardly be expected that his knowledge of the law would be either extensive or profound with the interruptions which had attended his legal studies. Fortunately for him, the questions to be settled were of novel character, which depended not upon authority or precedent, but upon broad principles of justice and equity. American jurisprudence was yet to be born. In the absence of precedents the advocate was obliged to rely upon general principles of jurisprudence and the analogies to be derived from the common law. It was a constructive period of the law, which called for the higher qualities of the profession. These Marshall possessed, and through them he attained an eminence which during a different period of judicial development or under other conditions might have given him a less prominent position. His increasing popularity and business soon led him to change his residence to Richmond, the new capital of the State, where he was brought into active competition with such leaders at the bar as Patrick Henry, Alexander Campbell, Edmund Randolph, Benjamin Botts, and James Inness, among whom he took rank as an equal.

How he impressed his contemporaries at the bar we learn from the pen of William Wirt, who wrote of him as follows: "All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of manner, the correspondent simplicity and energy of his style, the close and logical connection of his thoughts, and the easy gradations by which he opens his lights on the attentive minds of his hearers."

He was not allowed to pursue his professional career without interruptions, for hardly had he been called to the bar when he was elected a representative of his county in the Virginia Legislature. This honor was conferred unsolicited, as, indeed, were all the offices, military, political, and judicial, which he held during his long and useful life.

During his service in the Legislature he was elected by

that body a member of the Executive Council, and was also made a general in the new organization of the State militia under the peace establishment. The Legislature convened in October, 1781, shortly after the surrender of Cornwallis, which practically closed the war in Virginia. Grave questions of State and national policy early engaged his attention, prominent among which was the necessity for making immediate provision for the payment of officers and soldiers from Virginia, who were about to be disbanded in a destitute condition, although the State was largely in their debt. No one was more alive to the pressing needs of his former comrades-in-arms than was John Marshall, and he made their case his own in the Legislature. The difficulties of the situation were almost insurmountable. There was not a dollar in the federal treasury, and the treasury of Virginia was scarcely better supplied. There was neither public money nor public credit. The repeated failures of the States to comply with the requisitions of Congress for supplies had begun to produce most disastrous results. The Nation as well as the States was bankrupt. Such was the imminence of the public danger, and apprehension of civil convulsions growing out of the delinquency of the States in meeting the requisitions of Congress for the army, for the relief of the public credit and the payment of the debts contracted in prosecuting the war for independence, that Congress sent two of its own number — John Rutledge, of South Carolina, and George Clymer, of Pennsylvania — to explain to the State Legislatures, in person, the condition of affairs and the dangers which menaced the country. The delegates visited Richmond, and addressed the General Assembly. Marshall was profoundly impressed, as a member of that body, with the dangers of the situation. He earnestly advocated measures which would enable the State to discharge her own obligations and strengthen federal authority, thus enabling Congress to perform its duty towards the army and public creditors. Virginia was so exhausted by the previous demands on her resources, and Congress

was so feeble and powerless under the restrictions of the Articles of Federation, that Marshall clearly perceived that the system of voluntary State contributions for the relief of the public necessities was a total failure, and that the only remedy was the creation of a vigorous government, with ample powers to provide for the public needs. This conclusion was strengthened with the experience of each passing month, and early made him a member of the Federalist party, to whose principles he remained unalterably attached to the end of his days.

Of the gradual growth of these principles in his own case, we have his statement in a letter written to a friend many years afterwards: "When I recollect the wild and enthusiastic notions with which my political opinions of that day were tinctured, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when the love of the Union, and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom, when patriotism and a strong fellow-feeling with our fellow-citizens of Boston were identical, when the maxim, 'United we stand, divided we fall,' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States who were risking life and everything valuable in a common cause, believed by all to be most precious, and where I was in the habit of considering America as my country and Congress as my government."

Mr. Fiske has observed that, so far from the crisis being over with the treaty of peace with Great Britain in 1783, the next five years were the most critical years in American history; and among the sources of danger were the absence of the sentiment of union and the consequent danger of anarchy, the lack of faith of European statesmen in the

stability of the Union, local jealousies and antipathies, the anomalous character of the Continental Congress and the insufficiency of the Articles of Confederation, resulting in a military weakness of the government, its inability to obtain a revenue or to enforce its demands or to carry out the provisions of the treaty of peace. The British Navigation Acts and Orders in Council were destroying our commerce, and efforts to negotiate a commercial treaty with Great Britain had proved fruitless. An attempt to give Congress the power of regulating commerce had failed through the refusal of some of the States to approve of the measure, and already a war of restriction and retaliation existed between several States. Controversies had arisen between New York, New Jersey, and Connecticut, and between the latter States and Pennsylvania; and the quarrel between New York and New Hampshire over the possession of the Green Mountains had almost led to open rupture. American diplomacy was at a standstill. European States could not tell whether they were dealing with one nation or with thirteen, and American credit was at a discount throughout the world. Our commerce was plundered with impunity by the pirates of the Barbary States, and American citizens were seized and sold into slavery in the markets of Algiers and Tripoli. The Continental Congress was powerless to afford a remedy. It had no resources to build a navy, and was too poor to buy indemnity. In addition to this there was great financial distress. There was little accumulated capital in the country, as the war had destroyed all sources of revenue, and imports and exports had ceased. An inconvertible paper currency added to the hopeless confusion. What little specie there was soon disappeared. More than three hundred millions of paper money had been put into circulation by the Continental Congress. This money had depreciated in value till it required one hundred dollars of paper money to pay one dollar of indebtedness. Not even the interest on the national debt was paid, nor the debt to

our army which had won our independence. An era of wild speculation and extravagance was followed by sudden collapse and protracted suffering. In the absence of a circulating medium, barter was the only recourse; and whiskey in North Carolina and tobacco in Virginia did duty as measures of value. In many parts of the country the collection of taxes was almost impossible; and in their distress the people demanded, as a remedy, a further issue of paper money. In nearly every State some form of political quackery found expression in rash legislation, which only added to the existing evils. Trade was at a standstill, and confusion and disorder reigned throughout the land. In Rhode Island half a million dollars were issued in scrip, and acceptance of this worthless paper at its face value was commanded under a penalty of five hundred dollars fine and loss of the right of suffrage. Not until the courts of that State had declared the act void was there any relief from this foolish and oppressive legislation. In Massachusetts the pressure of debt was extreme, and the ability to pay was at a minimum. The courts were crowded with law-suits, homesteads were sold, cattle were distrained, and the debtor himself sent to jail. Popular indignation was aroused by these proceedings; and creditors, lawyers, and judges were included in the general condemnation. The public discontent finally resulted in what is known as "Shays's Rebellion," which threatened to overturn the State government, and was only put down when Governor Bowdoin called out an army of forty-four hundred men under command of the veteran General Lincoln. Similar outbreaks were imminent in other States. In New Hampshire and Vermont the courts had been broken up by armed mobs, and resistance to civil authority had resulted in bloodshed.

All these things had aroused the whole country to the dangers which threatened the public peace and security, and had called into existence a public sentiment in favor of a strong central government, which finally led to the conven-

tion which assembled in Philadelphia in 1787, the outcome of whose deliberations was the United States Constitution, which has been pronounced by Gladstone as "the most wonderful work ever struck off at a given time by the brain and purpose of man." But it is not to be assumed that this Constitution is a piece of altogether original constructive work, and was not evolved out of previous conditions and precedents. Like many solemn documents which deal with human affairs and opinions, it was the outcome of conflicting views and bolstered by compromise. Many of its provisions directly point to evils from which the people had suffered either under Royal governors or the impotent rule of the Continental Congress. Under both systems of government they had been taught the importance of separating the legislative and judicial departments of the government from the executive, and through the weakness of the Articles of Confederation had been brought to recognize the necessity of a strong central authority, which should unite in itself the functions of a national government, and be clothed with powers adequate to the national needs. The most original and valuable feature of the whole instrument was the creation of the federal judiciary. The powers of the United States Supreme Court under the Constitution make it the most august and powerful tribunal ever established by man. Instead of following the English system of government which, with its unwritten constitution, makes Parliament supreme, the fathers of the republic established a government strictly limited in its powers by a written constitution, and created a court with jurisdiction to declare null and void any act of Congress or of the Legislature of any State which should contravene any of its provisions. This novel feature alone entitles our Constitution to rank as the greatest product of constructive statesmanship that the world has ever known.

Although Marshall was not a member of the Federal Convention, he was a delegate to the Constitutional Convention in Virginia in 1788 which was called to ratify or reject the

proposed Constitution, and was largely instrumental in changing what was first an adverse majority into a minority of ten. Among those who opposed its ratification were men of such prominence as Patrick Henry, George Mason, and William Grayson, as well as Benjamin Harrison and John Tyler, the fathers of two future Presidents, and James Monroe, who was himself to be President. In the opposite ranks were Edmund Pendleton, James Madison, Edmund Randolph, James Inness, Henry Lee, George and William Nicholas, and John Marshall, then but thirty-three years of age. Two men could not well be more unlike in manner and temperament than Patrick Henry and John Marshall. The former was fiery, impetuous, and eloquent, the latter calm, dignified, and convincing.

In the discussions which lasted twenty-five days Patrick Henry took an active part, and was persistent and aggressive in his opposition to ratification. How extreme he was in the expression of his views, and how signally he failed to forecast the future can be seen by a few extracts from his speeches in the convention. Speaking of the form of government established by the Constitution, he said: "That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, 'We the people'? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of 'We, the people,' instead of 'We, the States'? States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated national government, of the people of all the States. Have they said, 'We, the States'? Have they made a proposal of a compact between States? If they had, this would be a confederation: it is otherwise most clearly a consolidated government. The question turns, sir, on that poor

little thing,— the expression We, the people, instead of the States of America. I need not take much pains to show that the principles of this system are extremely pernicious, impolitic, and dangerous." . . .

"This Constitution is said to have beautiful features; but, when I come to examine these features, sir, they appear to me to be horribly frightful. Among other deformities, it has an awful squinting. It squints towards monarchy; and does not this raise indignation in the breast of every true American? Your President may easily become king. Your Senate is so imperfectly constructed that your dearest rights may be sacrificed by what may be a small minority, and a very small minority may continue forever unchangeably this government." . . .

"If your American chief be a man of ambition and abilities, how easy it is for him to render himself absolute! The army is in his hands; and, if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design. And, sir, will the American spirit solely relieve you when this happens? I would rather infinitely— and I am sure most of this convention are of the same opinion — have a king, lords, and commons than a government so replete with such insupportable evils. Away with your President: we shall have a king. The army will salute him monarch, your militia will leave you and assist in making him king and fight against you; and what have you to oppose this force? What will then become of you and your rights? Will not absolute despotism ensue?" . . .

But there were more serious objections than those presented by Patrick Henry; and opposition was especially directed against the power of Congress to impose and collect taxes, to call out, arm, and govern the militia, and to regulate commerce, and against the extensive powers given to the federal judiciary. It required all the wisdom and logic of a Randolph, a Madison, and a Marshall to convince the

Virginia Convention that these powers were essential attributes of an adequate central government for the whole country.

After his service in the convention, Marshall wished to retire from further public service and to devote himself to the practice of his profession; but his popularity and influence were such that in the troublous times which followed the adoption of the Constitution his services as a legislator were again sought by his constituents, who returned him for a fourth time as a member of the General Assembly, notwithstanding the fact that an anti-federal majority in his own county was known to exist.

The leading measures of Washington's first administration were the subject of long and animated debate in the Virginia Legislature, and in these discussions Marshall defended the administration with great force and ability. In 1792 he positively declined a re-election to the Legislature, and during the three following years devoted himself without interruption to his professional work.

In 1794, following the outbreak of the war between France and England, came Washington's proclamation of neutrality and the Jay Treaty, so called, with England, which aroused great opposition in many of the States. At a public meeting held in the city of Richmond in opposition to the ratification of the treaty, Marshall made an address in its defence sustaining its constitutionality, which was assailed on the ground that, as the Constitution gave the power to Congress to regulate commerce, the President had no right to negotiate a commercial treaty. This argument first made Marshall's name known throughout the country, and established his reputation as a great constitutional lawyer. When in the spring of 1795 it was apparent that the national administration would meet with great opposition in the Virginia Legislature, Marshall was again forced to accept an election to that body. Meanwhile the relations of the United States with France had become more and more strained, and had

resulted in the refusal of the French government to receive General Pinckney as our minister resident. President Adams, on his election in 1797, found it necessary to send a special mission to France; and John Marshall, General Pinckney and Elbridge Gerry were appointed envoys extraordinary for that purpose.

The seizure of British property and persons on board of American vessels by France, and the President's message to Congress at a special session, recommending prompt measures of redress and preparations for hostilities, had brought the two nations nearly to the point of war, so that the situation on the arrival of the envoys in Paris in October, 1797, was critical. The foreign minister, Talleyrand, refused them a public audience, and through one of his agents intimated that before they could be received in their official capacity, and as a preliminary to negotiations, certain explanations and disavowals as to some parts of President Adams's message to Congress would be necessary, together with the payment of a douceur of two hundred and fifty thousand dollars to members of the French Directory. These insulting suggestions did not meet with a favorable reception from our representatives, who were not inclined to apologize for the President, nor to pay a bribe to members of the French government for the privilege of opening formal negotiations; and, when it was found that further attempts at negotiations were useless, on the eve of their departure for the United States, a formal paper addressed to the French minister was prepared, setting forth the objects of their mission and the points at issue between the two governments. This paper was prepared by Marshall, and was a full, clear, and vigorous statement of the whole subject. As a state paper, it stands as a model for American diplomacy, and added to Marshall's already high reputation when its contents became known to his countrymen.

On his return to America a public dinner was given to Marshall by members of both Houses of Congress, then in

session in Philadelphia, "as an evidence of affection for his person and of their grateful approbation of the patriotic firmness with which he sustained the dignity of his country during his important mission." It was at this dinner that the scandalous proposal of Talleyrand evoked the sentiment since so often repeated, "Millions for defence, but not a cent for tribute."

In the summer of 1798 President Adams offered to Marshall a position upon the bench of the Supreme Court of the United States, which the latter declined. The chief reason for his action was that, at the earnest personal solicitation of General Washington, who in view of the expected war with France had been appointed to command the army, and who felt that men of strong Federalist sentiment were needed in the national legislature at that juncture, he had finally consented to become a candidate for Congress. His election was stoutly opposed by the Democratic party with Mr. Jefferson at its head, but again resulted in victory for Marshall. The Congress to which he was elected was remarkable for the number of distinguished men it contained, and, as has been said by one of Marshall's eulogists, was a body which "was perhaps never exceeded in the number of its accomplished debaters or in the spirit with which they contended for the prize of public approbation."

One of the first duties he was called upon to perform was to announce in the House the death of his friend and leader, General Washington; and the resolutions which he presented, drawn by another hand, contained the memorable words "first in war, first in peace, and first in the hearts of his fellow citizens."

In the deliberations of the House he was recognized as an authority on all questions involving international and constitutional law; and his discussion of such questions was exhaustive, and left little to be said. One instance will illustrate the influence he exercised by his masterly powers in debate. A resolution had been offered arraigning the

President's conduct in surrendering to the British authorities, under a clause of Jay's Treaty, one Thomas Nash, better known under his assumed name of Jonathan Robbins, who was claimed as a British subject upon a charge of murder committed upon the high seas on board of an English frigate. Great public excitement was aroused throughout the country in consequence of this surrender, as the man alleged himself falsely to be an American citizen, and to have committed the homicide in his attempt to free himself from an unlawful imprisonment, as he claimed to have been impressed into the British navy. Marshall defended the action of President Adams, as authorized by the Constitution. During the delivery of Marshall's speech, Albert Gallatin took a position near him in order to take notes of his argument, intending to answer them; but, as the speaker proceeded in his marvellous exposition of the constitutional questions involved in the discussion, Gallatin was observed to lay aside his pencil, and to retire to the back of the hall. One of his friends approached him, and inquired why he had ceased to take notes, asking if he didn't mean to reply to Marshall. Mr. Gallatin answered, "I do not." "Why not?" he was asked. "Because I cannot," was the reply. "If you can, I wish you would. There is absolutely no reply to make, for his speech is unanswerable."

Congress adjourned in 1800; and Marshall soon after accepted the position of Secretary of State in the cabinet of President Adams, and resigned his place in Congress.

The new Secretary found ample opportunity for the exercise of his talents in the disturbed relations with both Great Britain and France at that time; and his instructions to our ministers, in view of threatened hostilities, breathe a spirit so firm, fearless, and dignified as to entitle them to rank in the highest order of state papers.

While Secretary of State, he was appointed, on the resignation of Oliver Ellsworth, Chief Justice of the United States, and took his seat on the bench of the Supreme

Court at the commencement of the next term, beginning Feb. 4, 1801.

How highly he was esteemed by President Adams is shown by a remark made by the latter to the youngest son of the Chief Justice in 1825, when, referring to his father's appointment to the Supreme Bench, President Adams said, "The gift of John Marshall to the people of the United States was the proudest act of my life"; and William Pinckney has recorded his estimate of John Marshall by saying, "He was born to be the Chief Justice of any country in which he lived."

When Marshall was appointed Chief Justice of the United States, he was forty-five years of age, and had never yet filled any judicial office. While his great abilities were recognized by the legal profession and the public, he had yet to demonstrate that he possessed the qualities of a great judge.

Although the Supreme Court had been in existence twelve years at this time, and three chief judges with brief terms of office had preceded him, only two decisions of that court had been made on questions of constitutional law, and these of minor importance.

It is difficult for us in this generation to appreciate the difficulties that surrounded the judicial department of the government in the discharge of its duty to expound and construe the federal Constitution. It had been adopted under great opposition, had aroused great difference of opinion among wise and patriotic men as to its true meaning on many material points, and had become a subject of heated political controversy, in which State pride and jealousy and fear of a strong central government entered as elements.

Marshall, in his Life of Washington, has stated in clear language the issues which then threatened to disrupt the country. "It was," he said, "divided into two great political parties, the one of which contemplated America as a

nation, and labored incessantly to invest the federal head with powers competent to the preservation of the Union. The other attached itself to the State government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

At the date of his appointment no case had yet called for a decision of questions which opened up the whole scheme of the Constitution and determined the rules for its interpretation, nor had the meaning and scope of the important provisions which restrained the powers of Congress and of the States presented themselves for adjudication. The field was absolutely new. The world had never known before such a science as the law of a written constitution of government. There were no precedents, and the road had to be cut without the aid of landmarks or guides. To construct a system of jurisprudence under these conditions required a man of the highest judicial order; for it was not sufficient to give decisions which were technically correct, but it was also necessary to support them by reasons which should commend themselves to the great body of the people, and to combine all these decisions on different questions in a manner so harmonious and consistent as to create a system of constitutional law which by universal consent should become the fundamental law of the land. To accomplish this task required a mind which combined the highest judicial faculty with great intellectual strength and scope. These qualities Marshall possessed, and they enabled him to ultimately raise a structure of constitutional law which entitles him to rank among the very greatest judges which the world has known. One of the first cases calling for a construction of the Constitution with which Marshall had to deal was the suit of Marbury *v.* Madison. This case presented the question of the power of the court to set aside an act of Congress because it was in violation of the United States Constitution. The decision of this case not only set at rest

this important question, but emphasized the conflicting and antagonistic views of the Constitution which were entertained by the Federalists and the Republicans of that day. Jefferson, who was then President and the recognized leader of the Republicans, did not hesitate to declare the decision a perversion of the law, and indulged in undignified and captious criticism of the Chief Justice. Looking back upon these questions after an interval of nearly a century, we cannot but rejoice that a Marshall, and not a Jefferson, was then Chief Justice; for, if the views of the latter had prevailed, the whole course of our constitutional history would have been altered, and the current of our national life been restricted within much narrower bounds. The case was presented upon a petition for mandamus, requiring Madison, who was then Secretary of State, to deliver a commission to Marbury, who had been appointed and confirmed by the Senate as a justice of the peace for the District of Columbia before President Adams retired from office, but whose commission had not been delivered, although signed by the President and sealed with the seal of the United States, when Jefferson came into office. The court decided that Marbury was entitled to the commission, and that the withholding of it was a violation of a vested right, but also held that the Supreme Court had no jurisdiction over the case because the act of Congress conferring the power on the Supreme Court was unconstitutional.

How great a landmark this was in constitutional law, we of this generation, who have become accustomed to the exercise of the regulative power of the Supreme Court in matters of legislation, can hardly appreciate; but at the time it was made it seemed little less than revolutionary to lawyers, who had been trained in the common law, and educated in the English theory that the legislative department of the government was omnipotent. For such men it was difficult to conceive how any law which the legislature might pass, and the executive approve, could be set aside by a mere judgment of a court. It was a novelty in jurispru-

dence, and no precedent could be found to sustain it in ancient or modern history. Although the Constitution declared that the judicial power should extend to "all cases arising under the Constitution and the laws of the United States," when the question was first presented in a federal court, this power seemed so fraught with evil and so far-reaching in its consequences that escape was sought by a narrow and strained construction of its provisions. How easily Marshall brushed aside these objections, and clearly laid down the principles which have ever since governed our highest court, may be seen by a short extract from the opinion he delivered: "The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? This would be to overthrow, in fact, what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

Following this the court was called upon in Fletcher *v.* Peck to pass upon the constitutionality of an act of the Legislature of the State of Georgia, which was pronounced to be null and void as in violation of the United States Constitution. The same objections which attached to the exercise of the power of the court in the former case were intensified in this case by a feeling that the independence of the State governments was threatened by the jurisdiction claimed by the court. The question at issue was the ownership of a tract of land, for which one Legislature had granted a patent which a subsequent Legislature had repealed. Again Marshall pronounced the judgment of the court which established the doctrine that under the Constitution the States are prohibited from passing laws impairing the obligation of contracts, and that the power of the court was sufficient to protect even an individual against the injustice of a State.

This principle was again invoked in the celebrated Dartmouth College case, the opinion in which, to quote the language of one of the present justices of the Supreme Court, "contributed as much as any he ever delivered to the great reputation of Chief Justice Marshall," and settled the doctrine that a corporate charter is a contract within the protection of the federal Constitution, so that it has ever since been recognized as a "canon of American jurisprudence, whose doctrines," in the language of Chief Justice Waite, "have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself." The facts were these: A charter had been granted by the crown to Dartmouth College in 1769, placing its government in the hands of a board of trustees, and providing for their succession; and on the faith of this charter the college had been privately endowed. In 1816 the Legislature of New Hampshire attempted to amend the charter and change its form of government; but the trustees of the college refused to accept the acts, and recourse was had to the State courts, where judgment was given

against them, and appeal was taken to the Supreme Court of the United States. Mr. Webster and Mr. Hopkinson appeared for the college; and Mr. Wirt, then Attorney-general of the United States, and Mr. Holmes appeared on the other side. The principal arguments were made by Mr. Wirt and Mr. Webster. The latter had argued the case in the court below, and was familiar with the whole controversy. He was a graduate of the college, and his devotion to his Alma Mater led him to exert all his powers in her defence. His argument was considered one of the most masterly efforts of his professional life. Towards its close he was overcome by emotion, and paused to recover his composure. Looking at Chief Justice Marshall, he said in those deep tones which so often thrilled the hearts of an audience, "I know not how others may feel; but, for myself, when I see my Alma Mater surrounded, like Cæsar in the Senate House, by those who are reiterating stab upon stab, I would not for this right hand have her turn to me, and say, 'Et tu quoque, mi fili.'" The importance of this decision is well stated by one of the eulogists of Marshall, who says: "The case of Dartmouth College is the bulwark of our incorporated institutions for public education, and of those chartered endowments for diffusive public charity which are not only the ornaments, but among the strongest defences of a nation. It raises them above the reach of party and occasional prejudice, and gives assurance to the hope that the men who now live may be associated with the men who are to live hereafter, by works consecrated to exalt and refine the people, and destined, if they endure, to unite successive generations by the elevating sentiment of high national character." It is not without interest to add that our own Alma Mater invoked successfully the doctrine of this great case for the protection of her chartered rights against legislative action by the State of Maine nearly seventy years ago, when the State attempted to change the constitution of its boards, and to exercise a direct influence in the management of its affairs; and it is not

less interesting to know that the friend and associate of Marshall for more than twenty years on the Supreme Bench — the learned author of the "Commentaries on the Constitution," Judge Story — delivered the opinion in this case which restored Bowdoin College to its ancient charter and privileges.

(This case will be found reported at length in Sumner's Reports, vol. i. pp. 276–318.)

The case of Cohens *v.* The State of Virginia presented the important question whether the Supreme Court could exercise jurisdiction where one of the parties was a State and the other a citizen of the same State, and whether in the exercise of its jurisdiction it could revise the judgment of a State court on a question arising under the Constitution and laws of the United States. The court held that it had jurisdiction over both questions, and in the course of his opinion the Chief Justice used the following memorable language: "It [the Supreme Court] is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of States in relation to each other, the nature of our Constitution, the subordination of the State governments to that Constitution, the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case. The laws must be executed by individuals acting within several States. If these individuals may be exposed to penalties and if the

courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be at any time arrested by the will of one of its members. Each member will possess a veto on the will of the whole."

"That the United States form, for many and for most important purposes, a single nation has not yet been denied. These States are constituent parts of the United States. They are members of one great empire, for some purposes sovereign, for some purposes subordinate. In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the Constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal, enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution? We think not. . . . The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States is, we believe, essential to the attainment of those objects."

In 1807, Chief Justice Marshall presided over the trial of Aaron Burr, in the Circuit Court of the United States in the city of Richmond, Virginia, on an indictment for the crime of high treason in levying war against the United States. Burr had been Vice-President of the United States, and had come within one vote of being elected President; and his successful competitor was then President. He had killed Hamilton in a duel in July, 1804, and was bitterly hated by the Federalists for causing the death of their great leader. These and other acts had brought him into disrepute; and his restless ambition was seeking new fields for its exercise, and he thought he had found it in an expedition which he

set on foot against the Spanish possessions lying to the south of the United States.

In 1805 he made preparations for the invasion and conquest of Mexico, and contracted for the construction, on the Ohio River, of a large number of transports for the expedition, a part of which assembled at Blennerhassett's Island in the State of Virginia, where the main depot of supplies and stores was established. At this point a force of some thirty or forty armed men assembled as the nucleus of his future army; but further operations were arrested by a proclamation of the President, denouncing the scheme and ordering the arrest of all participants. Burr, among others, was arrested and brought to Richmond for trial, and was defended by distinguished counsel, including the late Attorney-general, Randolph, and Luther Martin, of Maryland. The trial attracted a large number of citizens, not only from Virginia, but from other States, and aroused throughout the country great interest and excitement. William Wirt was employed on a special retainer of President Jefferson to aid the government prosecutor at the trial; and the pressure of public opinion was exerted to obtain a conviction, which it was said the "people of America demanded." Although Burr was tried before a man who was the special friend of Hamilton, the scales of justice were held with an absolutely even hand. The framers of the Constitution, remembering the judicial murders which had been committed in England under the law of constructive treason, had wisely provided in the Constitution that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort," and further provided "that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court." The question to be decided was whether the assembling of a few armed men at Blennerhassett's Island constituted a "levying of war" against the United States. On this question the Chief Justice charged

the jury as follows: "An assemblage to constitute an actual levying of war should be an assemblage with such force as to justify the opinion that they met for the purpose. Why is an assemblage absolutely required? Is it not to judge, in some measure, of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat and sailing down the Ohio for the avowed purpose of attacking New Orleans could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? . . .

"Now an assemblage on Blennerhassett's Island is proved by the requisite number of witnesses, and the court might submit it to the jury whether that assemblage amounted to a levying of war; but, the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness, and of consequence all other testimony must be irrelevant."

Following the law laid down by the Chief Justice, the jury brought in a verdict of "not guilty"; and the angry counsel for the government declared that "Marshall had stepped in between Burr and death."

In the course of the trial the court was asked to issue a *subpœna duces tecum*, directed to the United States marshal, commanding him to summon Thomas Jefferson, President of the United States, to appear before the court, and bring with him certain papers therein designated which Burr alleged were necessary for his defence, and which were in the possession of the Executive Department at Washington; and after a full hearing the Chief Justice ordered the *subpœna* to issue. This with other features of the trial caused great dissatisfaction on the part of the President, who had the bad taste and temper to denounce the ruling of the court as "an offensive trespass on the Executive Department of the Government," and further gave vent to

his dissatisfaction with the conduct of the trial in a message to Congress. But the judgment of posterity has sustained the course of Marshall, and it is generally admitted "that never in all the dark history of State trials was the law, as then it stood and bound both parties, ever interpreted with more impartiality to the accuser and the accused."

How fully he appreciated the responsibilities and difficulties of his decision is shown in the language of his charge, where he said: "That this court dares not usurp power is most true. That this court does not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But, if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

The rule of construction as governing the Constitution which the Chief Justice laid down in the early case of Gibbons *v.* Ogden is characteristic of the broad and firm grasp he had of the underlying principles of our government. He avoids the extreme of either broad or narrow construction of the instrument, and declares that the natural meaning of the words must govern without being wrenched in any direction. It cannot be stated in language more clear than his own. "This instrument," he said, "contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly; but why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized to make all laws that shall be necessary and proper for the purpose. But this limita-

tion on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribed this rule. We do not therefore think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent,— then we cannot perceive the propriety of this strict construction, nor adopt it as a rule by which the Constitution is to be expounded."

The bar of the Supreme Court of the United States, during the period of Marshall's Chief Justiceship, presented a galaxy of brilliant and distinguished names. Among them were Dexter and Webster, Hoffman, Ogden, Emmett, Rawle, Ingersoll, Sargent, Binney, Pinckney, Randolph, and Wirt; and the arguments of these great leaders of the bar aided not a little the labors of the court. For thirty-four years Marshall continued the series of judgments which constitute the basis of the constitutional law of this country, which, it is not too much to say, owes more to Marshall than to any other man.

How much credit is due to Marshall in this work appears by the testimony of one of his associates, who was not likely to undervalue or disparage the labors of other members of the court. In an article on Marshall, contributed

during the latter's lifetime to the *North American Review* in 1828, Judge Story said: "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say of Chief Justice Marshall. For, though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case or from motives of delicacy abstained from taking an active part." But, in addition to these labors, he also dealt with other subjects where there were few precedents to guide him, such as the rights of the Indian tribes over the lands which they had formerly occupied, and as nations in the States in which they dwelt; and in international law he had to deal with such questions as the complicated rights of neutrals and belligerents, captors and claimants, of those trading under flags of peace and those privateering under laws of marque and reprisal, together with questions of the jurisdiction and judgments of foreign tribunals in matters of prize law, where there were few precedents for their solution.

Near the close of his life, in the seventy-fifth year of his age, he was a member of the Virginia State Convention, which was called in 1829 to revise the State Constitution. In that distinguished assembly there were two ex-Presidents of the United States, Madison and Monroe, besides other men of brilliant talents and national reputation. Among them Marshall was not the least distinguished. The dis-

cussions lasted several weeks, and developed great differences of opinion, accompanied with no little acrimony in debate. The Chief Justice used his great powers in urging a spirit of conciliation and compromise on many questions which had proved a source of dissension and debate; but on the question of judicial tenure of office he took a positive stand, and spoke with great earnestness and power, and in words which may well be repeated in these days, when the independence of our judges is threatened by popular elections, and the encroachment of the legislative upon other departments of the government is becoming more and more marked. On this subject Marshall spoke as follows: —

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depend upon that fairness? The judicial department comes home, in its effects, to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience? . . . We have heard about sinecures and judicial pensioners. Sir, the weight of such terms is well known here. To avoid creating a sinecure, you take away a man's duties when he wishes them to remain; you take away the duty of one man, and give to another; and this is a sinecure. What is this, in substance, but saying that there is and can be and ought to be no such thing as judicial independence? . . I have always thought, from my earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary. Our

ancestors thought so; we thought so until very lately; and I trust the vote of this day will show that we think so still. Will you draw down this curse on Virginia?"

Of the personal qualities of Marshall, much might be said. His father has said of him that "he never seriously displeased him in his life," and the testimony of his own family bear witness to the almost flawless quality of the man. Of how many could it be truly said, as one of his relatives has said of him: "He had no affrays in boyhood. He had no quarrels or outbreakings in manhood. He was the composer of strifes. He spoke ill of no man. He meddled not with their affairs. He viewed their worst deeds through the medium of charity. He had eight sisters and six brothers, with all of whom, from youth to age, his intercourse was marked by the utmost kindness and affection, and, although his eminent talents, high public character, and acknowledged usefulness could not fail to be a subject of pride and admiration to all of them, there is no one of his numerous relations who has had the happiness of a personal association with him in whom his purity, simplicity, and affectionate benevolence did not produce a deeper and more cherished impression than all the achievements of his powerful intellect."

One of his intimate personal friends has paid him this tribute: "In private life he was upright and scrupulously just in all his transactions. His friendships were ardent, sincere, and constant, his charity and benevolence unbounded. He was fond of society, and in the social circle cheerful and unassuming. He participated freely in conversation, but from modesty followed rather than led. Magnanimous and forgiving, he never bore malice, of which illustrious instances might be given. A republican from feeling and judgment, he loved equality, abhorred all distinctions founded upon rank instead of merit, and had no preference for the rich over the poor."

Unlike many judges, he knew how to unbend; and the serious side of his nature was relieved by a sense of humor